1951.

File No. O. Prohibition /41

Legal **DEPARTMENT**

A **BRANCH**

Subject:—

Opinion, under the Bombay Abkari Act 1878 (Prohibition)

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C O N T E N T S.

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Sr.No.	Compilation No.	Subject	pages.
		Bombay Abkari Act,1878.	
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4.	R.I.No.5852 dt. 5-7-41 C.No.6808 dt. 2-8-41	Sec. 188(1) -Whether under--the collector can refuse the grant of a licence, permit or pass for the import into, export from, removal within or possession in any prescribed area of Bhowra flowers brought from an Indian state	9-12
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Office of the R.L.A.

The first question referred to the Remembrancer of Legal Affairs for consideration is whether it is open to Government in view of the recent decision of the High Court in the toddy-tapping case to direct the Collector to blacklist a person, which in effect is equivalent to overruling the Commissioner's order.

2 The rules for blacklisting persons are the executive orders of Government issued under Government Resolution, Revenue Department, No. 8221/33, dated 29th March 1940, for the guidance of its officers conducting auctions. Under these rules the Collectors and the commissioner are empowered for any of the reasons mentioned in rule 1 to blacklist persons and thus as prohibit them from holding licenses for sale of intoxicants . The effect of any order of Government directing the Collector to blacklist a person would therefore be to direct him not to issue any license to such person. Under section 16 of the Bombay Abkari Act, except as otherwise provided, no intoxicant or hemp shall be sold without a license or pass from the Collector. By virtue of this section there is an implied power conferred upon the Collector to grant licenses or passes. In the recent toddy-tapping case the High Court has held that the powers of the Abkari officers under the Act can be controlled only by rules made under sections 25 and 35A and not by orders issued under section 4. In view of this decision it will not be possible to issue any orders under section 4 to the Collector directing him to blacklist any person, but it will still be open to Government to issue departmental instructions to its officers and the officers can act in pursuance of these instructions. Only the officers will have to give their own reasons for passing any order even though those reasons may be the same as are mentioned inthe instructions received from Government. It will, therefore, be possible for Government to issue instructions to the Collector to blacklist a person. But

the question is whether in the present case the Collector, if asked by Government to blacklist the licensee, would be properly exercising his discretion in blacklisting him and thus prohibiting him from holding any license in respect of the toddy-shops. The Collector had in this case first cancelled the licenses for the toddy shops under section 32(2) of the Act but the Commissioner in appeal cancelled the collector's order as in his opinion there was no justification for cancelling those licenses. The collector circumvented the Commissioner's order by blacklisting the licensee and then again cancelling the toddy shops licenses. This second order of the collector cancelling the toddy shop licenses was also set aside by the commissioner. In his first order dated 12th October 1940 (page 35) the Commissioner has stated: "The circumstances of the toddy shops are completely different from those of the two country liquor shops." It is doubtful whether in view of these two orders of the Commissioner, the Collector can blacklist the licensee and thus prohibit him from holding licenses for the toddy shops. If the Collector refuses to grant licenses to the licensee in respect of the toddy shops, the refusal may not be considered by a court of law as the proper exercise of the discretion vested in the Collector under the Act, inasmuch as the cancellation of licenses in respect of those shops by the Collector was not justified in the eyes of his superior officer.

3. The second question for consideration is whether the hemp drug licence held by the licensee can now be cancelled on the ground of irregularities committed by him last year in respect of country liquor shops,. It appears that his license was granted to him considerable time after his country liquor licenses was were cancelled. It would not therefore be possible to cancel this license now on the above ground under section 32(2).

O.C. • P.N.M.
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Remembrancer of Legal Affairs.

U.R. to R.D., No. 4444, dated 15th May 1941.

S.AIK.
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Office of the R.L.A.

Attention is invited to the last two sentences in para.2 of R.L.A.'s opinion dated 15th May 1941 (page 73) As pointed out therein, if the Collector refuses to grant licenses to Mr. Kokni in respect of the toddy shops , the refusal being in conflict with the Commissioner's order will not be regarded as a proper exercise of the discretion to refuse permission to Mr. Kokni to bid at the toddy auctions for 1941-42. For tthe same reasons,it is doubtful whether the course suggested by the Commissioner in his letter dated the 29th March 1941 (page 65) would be legal.. Unless Mr. Kokni again acts in a manner which makes it undesirable to grant him licenses in future, it will perhaps not be proper for the Collector to put him on the blacklist with effect from 1st April 1942.

O.C. P.E.N.

Remembrancer of Legal Affairs.

U.H. to R.D.No.5252, dated the 4th July 1941.

S.A.A.

24-4

Office of the R.L.A.

The implications of Justice Blackwell's judgment in so far as it affects the Bombay Abkari Act are stated in R.L.A's note containing a summary of the discussion at the conference with the Advocate General, copy of which was sent to R.D. on 6th May 1941.

2. The question as to how far the above judgment affects other Acts, will depend on the provisions of each Act and no general opinion can be given without examining the provisions of each Act.

C.C. P.S.H.

17-5

Remembrancer of Legal Affairs.

D.O. to the P.C., No. 4603, dated 10th May 1941.

S.A.K.
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Office of the S.I.A.

The question for S. .'s consideration is whether under section 188(1) of the Bombay Abkari Act, 1878, the Collector can refuse the grant of a licence, permit or pass for the import into, export from , transport within or possession in any prescribed area of Mhowra flowers brought from an Indian state.

2. Section 188(1) of the Bombay Abkari Act, 1878, provides inter alia that save as provided in sub-section (3) no person shall export from or import into any prescribed area or transport or have in his possession in such area any quantity of Mhowra flowes exceeding the prescribed limit in weight except under the authority of a licence, permit or pass granted by the Collector or other officer duly empowered in this behalf. Under secton 3(10) of the Act, to import means to bring into the Province, otherwise than across a customs frontier as defined by the Central Government and to export means to taken out of the Province, otherwise than across a customs frontier as defined by the Central Government. Section 188(1) of the Act, therefore, applies only in those cases in which Mhowra flowers are to be brought into the Province or taken out of the Province otherwise than across a customs frontier. It will not apply in the case of Mhowra flowers brought into the province from an Indian state or taken out of the Province to an Indian State. Consequently in the case of Mhowra flowers brought into any area in the Province of Bombay from an Indian State or taken out of such area to an Indian State, the question of granting or re-refusing a licence, permit or pass under section 188(1) does n arise. If Mhowra flowers brought into any such area from an Indian State are, however, to be taken out of the province otherwise

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than across the customs frontier, section 188(1) will apply and a licence, permit or pass for such export will be necessary under this section. The section also applies in case of transport and possession of Mhowra flowers within such area. It is true that an authority to issue a licence, permit or pass implies an authority to refuse such licence, permit or pass. In the case of 'Emperor vs. Dantos' (1940) I.L.R.Bom. 777, however, the High Court has observed that the Central Legislature is the authority to legislate in respect of import andexport of intoxicants across the customs frontier and that the Provincial Legislature has no power to legislate in such a way as to encroach upon the right to import and export across the customs frontier. In view of these observations of the High Court , it has been provided in the various notifications recently issued under the Abkari Act that a pass for the import, export, transport or possession of intoxicants etc. shall be issued by an Abkhri Act Officer on his being satisfied at that the import, export, transport etc. is incidental to its import into or export from the Province of Bombay across the customs frontier (e.g. G.N.R.D.No. 374/39(a) dated 1st October 1940- page 1005 of Bombay Government Gazette of 1940, part IV -B). The same rule should be followed in the case of Mhowra flowers and a licence, permit or pass for the export, transport or possession of such flowers should always be granted if the Abkari Officer concerned is satisfied that such export, transport or possession is incidental to import into or export from the rovince of Bombay across the customs frontier.

O.C. P.N.M.

1-8

Remembrancer of Legal ~~Department~~ Affairs

U.R. to R.D.No. 6808, dated the 2nd August 1041.

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tapping toddy-producing trees. While forwarding the application Messrs. Gagrat and Co. contend on behalf of their client that he is entitled to obtain the license on the same old rates on which Todiwalla has been granted a license , since Government cannot discriminate between an owner and owner (of toddy producing ttrees). They further contend that the new rates prescribed by G.N.R.D.No. 1977/33 dated 28th April 1941 are not only excessive but prohibitive and are as such illegal, as the result of the levy of such rates would be to deprive an owner of toddy-producing trees of his right to apply for and obtain the license for tapping trees. This is prohibited as Government cannot do indirectly what they cannot do directly under the provisions of the Bombay Abkari Act. The A.L.A. is requested to state what course of action should be adopted in this case.

4. The reasons for suggesting that Toddiwalla should be granted a license at the old rates and not at the revised rates prescribed by Government Notification in the Revenue Department No. 1977/33 dated 28th April 1941. If Waigaonkar goes to a court of law and contends that Government cannot discriminate between owner and owner it can be pointed out to the court that only one person, namely, Todiwalla has been granted the license on more favourable terms and that too in view of the High Court's orders. It can also be pointed out that the favourable terms granted to Todiwalla are only for the year 1941-42 and not for all times.

5. As Regards the second contention urged by Waigaonkar's Solicitors thatthe present revised rates prescribed by Government Notification in the Revenue Department No. 1977/33 dated 28th April 1941 are exhorbitant and therefore illegal, attention is invited to para. 6 of R.A. L.A.'s opinion No. 166-Confl. dated 1st April 1941 and para. 7 of the Advocate General's opinion dated 6th April 1941 in which thepoint has

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In the first case one Mr. Patil had on 5th June 1941. made an application to the Collector of Bombay for the grant to him of a license for tapping toddy-producing trees for his use at the old rates for the year 1941-42 (1st August 1941 to 31st July 1942). The Collector by his letter dated 24th June 1941 informed the applicant that he would get the benefit of the reduced rates (the old rates) for the current year only. On 3rd July 1941 the applicant again applied to the Collector for the grant to him of a license at the old rates for the year 1941-42. To this the Collector sent a reply that as he was not prepared to pay the tree tax at the revised rates, that is Rs.360 per tree, for the year 1941-42, his application was filed . The applicant has now approached the Commissioner of Excise for the grant of a license to tap toddy-producing trees for his use at the old rates . The Commissioner has sent the application for the orders of Government with his letter dated 2nd October 1941 in which he states that the applicant Patil is one of the persons who had applied for and was refused a domestic consumption license prior to the date of the High Court decision in Toddiwalla's case. The question is whether the applicant would be entitled to grant of the license asked for by him in the modified form in which it has been granted to Todiwalla and at the old rates.

2. Attention is invited to A.L.A's opinions Nos. 4973 dated 22nd May 1941 and No. 1551 dated 28th July 1941. In view of the legal position stated in these opinions Mr. Patil will not be entitled to the grant of the license in the modified form or at the old rates.

3. In the second case Messrs. Gagrat and Co. have sent to the Superintendent of Excise Mr. Dattatraya Gopal Waigaonkar's applicant for the grant of a license for

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already been considered. As held by the Advocate General it would be legally competent to impose a tax or duty under the Abkari Act for the purpose of promoting the policy of prohibition. Therefore the high rates prescribed by Government Notification No. 1977/33 dated 28th April 1941 are valid. From the legal point of view, it is not, therefore, necessary to reduce the existing high rates of toddy tax or to grant Waigunnkar or any other applicant licensees at the old rates for the year 1941-42.

J.C. P.A.K.

18-10

Remembrancer of Legal Affairs.

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18-10

U.O. to S.D.No. 340-L dated the 18th October 1941.

P.A.K.

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The questions for consideration are:-

(1) whether under the proviso to section 12 of the Bombay Abkari Act one notification can be issued for each of the revenue division; and

(2) whether the existing rates of vend and special fees are valid on the grounds mentioned in the Commissioner of Excise's No. 61-66/40 dated 2nd September 1941.

2. As regards the first question, attention is invited to para. 3 of R.L.A.'s opinion No. 2223 dated the 12th March 1941. There is no legal objection to issuing one notification for all the local areas in a division.

3. As regards the second question, attention is invited to para. 2 of R.L.A.'s opinion referred to above As stated therein it is possible to contend that the existing rates at which the fees are levied are unreasonable and as such they are likely to be challenged in a court of law. These rates appear to have been prescribed by notifications under section 12and 30 of the Bombay Abkari Act (e.g. see notifications No. 102-C dated 9th May 1923, No. 5629/34 dated 28th March 1928 and No. 6127(a)-C dated 10th August 1928-the Bombay Excise Manual paras. 31,31A and 32 in Part II). These notifications are not rules made under the BombayAbkari Act and therefore section 64 of the Act has no application to them. The Government of India (Adaptation of Indian Laws) Order has also no application to there notifications. The Adaptation Order does not purport to make and has not made any adaptations or modifications in the notifications or orders issued under the various Acts. Moreover any modification or adaptation in the rules or orders on the ground that the rates of fees prescribed therein are not valid would have been beyond the scope of section 293 of the Government of India Act, 1935. The view taken by the Commissioner of

Excise that the rates are valid on the grounds stated in para. 3 of his note dated 2nd September 1941 is not correct. The question whether fees at the existing rates should continue to be levied until challenged in a court is for Government to decide.

O.C. P.N.M.

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Remembrancer of Legal Affairs.

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U.R. to R.D.No.9289, dated the 28th October 1941.

S.A.K.

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